TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR

v.

MENTERI DALAM NEGERI & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[JUDICIAL REVIEW NO: R1-25-28-2009]
31 DECEMBER 2009

ADMINISTRATIVE LAW: *Judicial review - Judicial review proceedings – Intervention, application for - "Proper person" to be heard - Direct interest test - Rules of the High Court 1980, O. 53 r. 8(1)*

CIVIL PROCEDURE: *Parties - Intervention - Judicial review proceedings - "Proper person" to be heard - Direct interest test - Rules of the High Court 1980, O. 53 r. 8(1)*

CIVIL PROCEDURE: *Parties - Joinder - Judicial review proceedings - "Proper person" to be heard - Direct interest test - Rules of the High Court 1980, O. 53 r. 8(1)*

CIVIL PROCEDURE: *Intervention - Application for - Judicial review proceedings - "Proper person" to be heard - Direct interest test - Rules of the High Court 1980, O. 53 r. 8(1)*

Vide respective summons in chambers' applications made pursuant to O. 53 r. 8(1) of the Rules of the High Court 1980 ('the RHC'), the Majlis Agama Islam (MAI) of Wilayah Persekutuan, Johor, Selangor, Kedah and Malacca, the MAI dan Adat Melayu Terengganu and the Malaysian Chinese Muslim Association (MACMA) ('the applicants') sought, *inter alia*, leave to intervene and be added as a respondent for the purpose of being heard in opposition to the application for judicial review No. R1-25-28-2009 dated 16 February 2009. The applicants submitted that they had fulfilled the test under O. 53 r. 8(1) of the RHC as the subject matter of the judicial review proceedings was within their legal interest and scope of authority.

Held (dismissing the applications):

(1) The direct interest test for the determination of who is a "proper person" to be heard in opposition for purposes of O. 53 r. 8(1) of the RHC is that enunciated in *R v. Rent Officer Service, ex p Muldoon; R v. Rent Officer Service, ex p Kelly*,

A and not as in *Pegang Mining Co Ltd v. Choong Sam & Ors*. MAI and MACMA, however, failed to show that they had a direct interest because: (i) the impugned decision under challenge was in relation to an exercise of power or discretion by the Minister of Home Affairs ('the 1st respondent') under
B the Printing Presses and Publications Act 1984 ('the Act') regarding the right of the applicant in the substantive judicial review application ('the said applicant') to use the word "Allah" in its publication. This decision only involved two parties, the 1st respondent and the said applicant, who was
C adversely affected by the decision. Applying the reasoning in *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors*, MAI and MACMA were not involved in this decision and they could not, at this stage, claim that they ought to have been involved; (ii) MAI's role is purely to aid and advise the Heads
D of Religion of the States in matters relating to the religion of Islam. Matters under the Act do not fall within the scope of MAI; and (iii) MAI's action to intervene in these proceedings for the purpose of being heard in opposition on the notion of preventing widespread disobedience of God's laws among the
E Muslim community and the plural society was clearly misconceived as MAI, in their affidavits in support, neither demonstrated nor provided any basis to the claim that the use of the word "Allah" in the publication would lead to such consequences. At best, the applicants only had an indirect
F interest. *R v. Rent Officer Service, ex p Muldoon; R v. Rent Officer Service, ex p Kelly* (foll); *Pegang Mining Co Ltd v. Choong Sam & Ors* (dist); *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* (foll).

G **Case(s) referred to:**

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2008] 6 MLJ 488
H *CA* ***(foll)***

Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 ***(dist)***

R v. Rent Officer Service, ex parte Muldoon; R v. Rent Officer Service, Ex Parte Kelly [1996] 3 All ER 498 ***(foll)***

I **Legislation referred to:**

Rules of the High Court 1980, O. 15 r. 6(2)(b), O. 53 rr. 2(4), 8(1)

Civil Procedure Rules [UK], r. 54.17.1
Rules of the Supreme Court [UK], O. 53 r. 5(3)
Social Security Administration Act 1992 [UK], s. 135

For the applicant - Porres Royan (S Selvarajah, Leonard Teoh, Annou Xavier & Benjamin Dawson with him); M/s Fernandez & Selvarajah
For the 1st and 2nd respondents - Dato' Kamaludin Md Said (Mohd Nasir Desa, Suzana Atan, Arik Sanusi Yeop Johari, Andi Razalijaya A Dadi with him) SSFC
For the interveners
Mubashir Mansor
Abdul Rahim Sinwan
Majlis Agama Islam Dan Adat Melayu Terengganu & Majlis Agama Islam Wilayah Persekutuan; M/s Zainul Rijal Talha & Amir
Majlis Agama Islam Melaka; M/s Adli & Co
Majlis Agama Islam Negeri Kedah; M/s Omayah, Nawal & Partners
Majlis Agama Islam Selangor; M/s Azra & Associates
Mohd Tajuddin Abd Razak, Malaysia Chinese Muslim Association; M/s Tajuddin Razak
Ikbal Salam, Majlis Agama Islam Negeri Johor; M/s Ikbal Salam & Associates

Reported by Suresh Nathan

JUDGMENT

Lau Bee Lan J:

[1] *Vide* the respective summons in chambers' applications (encls. 72, 75, 86, 89, 95, 97 and 92) made pursuant to O. 53 r. 8(1) of the Rules of the High Court ("the RHC"), the Majlis Agama Islam (MAI) of Wilayah Persekutuan, Johore, Selangor, Kedah and Malacca, the MAI dan Adat Melayu Terengganu, in the case of Terengganu and the Malaysian Chinese Muslim Association (MACMA) (collectively referred to as "the applicants" unless otherwise stated) basically seek:

(1) leave to intervene and be added as respondent for the purpose of being heard in opposition to the application for judicial review No. R1-25-28-2009 dated 16 February 2009 (prayer 1);

(2) that the title of the proceedings be amended to insert and name the respective MAI and MACMA as a respondent (prayer 2).

[2] The court has considered the Skeletal Submissions of the 6 MAI dated 14 December 2009 (encl. 100) and MACMA of even date (encl. 102) together with the bundle of authorities (encl. 101) and the written submission of the applicant of the same date (encl. 103). The court's findings are the following.

[3] Order 53 r. 8(1) of the RHC states "Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers in the matter".

In the aforesaid provision I wish to stress on the phrases "any person who desires to be heard in opposition to the application (application for judicial review)" and "appears to the judge to be a proper person to be heard". In my view there are two limbs to be satisfied for a person who invokes O. 53 r. 8(1). In respect of the 1st limb, I find support from the dictum of Zulkelfli FCJ in *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors.* [2009] 6 CLJ 405, where His Lordship stated at p. 414 "O. 53 r. 8(1) of the RHC specifically caters to persons claiming an interest in the proceedings and who wish to be heard in opposition." and "This is discernible from the language of the rule in particular the phrase' ... appears to the judge to be a proper person ...".

As to who is a "proper person" to be heard (2nd limb), His Lordship opined at para 26 that it "must be read as referring to persons with a direct interest. In this regard the test for joinder as a party in judicial review was considered by the House of Lords in *R v. Rent Officer Service, ex parte Muldoon; R v. Rent Officer Service, ex parte Kelly* [1996] 3 All ER 498. It was concluded in that case that an indirect interest, even on the part of the Secretary of State, was not sufficient to justify joinder. I am of the view the same test would apply to the appellant in the present case. Unlike the position under the UK Civil Procedure Rules ('CPR'), the right of 'any person to be heard in opposition' in our O. 53 r. 8(1) of the RHC is qualified by the requirement of that person being a 'proper person'. Rule 54.17.1 of the CPR states 'any person may apply to file evidence or make representation at

the hearing of the judicial review'. There is therefore a significant qualification under our O. 53 r. 8(1) of the RHC 1980 which indicates some level of interest. It does not stand to reason for a party not having any direct interest to be allowed to be joined as a party, more so in the light of the nature of the jurisdiction being exercised in judicial review proceedings". A B

In *ex parte Muldoon and Anor (supra)*, the applicants, Muldoon and Kelly, each sought judicial review of the refusal or failure of Liverpool City Council to determine their respective claims to housing benefit under the Social Security Act 1986 and regulations made thereunder. The Secretary of State for Social Security who was responsible under the subsidy scheme for housing benefit set up under s. 135 of the Social Security Administration Act 1992 for reimbursing up to 95% of housing benefit paid by a local authority to claimants applied to the court for an order to be joined as a respondent to both applications for judicial review by the applicants as being a person directly affected within O. 53 r. 5(3) RSC (material part) reads "The notice of motion or summons must be served on all persons directly affected ..." The Secretary of State contended he was directly affected because a very large proportion of the housing benefit paid by the local authority to each individual claimant was in effect met by him and a decision in the applicants' favour would commit him to potentially very great expenditure in related cases. The Secretary of State appealed to the House of Lords from the decision of the Court of Appeal who upheld the decision of the trial judge in dismissing the Secretary of State's application. In dismissing the appeal, at p. 500 d-f the House of Lords stated "That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency. In the present case, if the applications for judicial review are successful the Secretary of State will not have to pay housing benefit to the applicants either directly or through the agency of the local authority. What will happen is that up to 95% of the amount paid by the local authority to the applicants will be added to the subsidy paid by the Secretary of State to the local authority after the end of the financial year. The Secretary of State would certainly be affected by the decision, and it may be said that he would inevitably or necessarily be affected. But he would, in my opinion, be only indirectly affected, by reason of his collateral obligation to pay subsidy to the local authority". C D E F G H I

[4] The applicant in the substantive judicial review application ("the applicant") submitted that O. 53 r. 8 of the RHC merely caters for any person who desires to be heard in opposition to the application and does not envisage that a person be allowed to intervene, be added as a respondent and be made a party to the judicial review proceedings; and submitted further that the 1st prayer is defective in so far as the MAI and MACMA seek to intervene and to be made a respondent. I find there is merit in this contention. It is significant to note that the Federal Court relied on the direct interest test as espoused in *ex parte Muldoon and Anor (supra)*, a case relating to a joinder application in a judicial review application in the determination of who is a "proper person" under O. 53 r. 8(1) of the RHC in the manner stated in para 26 of the report alluded to above. In this regard with respect, I cannot agree with the applicants' submission that in *Bong Boon Chuen (supra)* at para 26 pp. 319-320 the Federal Court has decided that O. 53 r. 8(1) of the RHC is the provision for joinder of parties in judicial review proceedings instead of O. 15 r. 6(2) of the same and with Mr. Mubashir's 1st oral observation that a joinder under O. 53 r. 8(1) has the same effect as that under O. 15 r. 6(2) of the same.

Mr. Mubashir made a 2nd oral observation that the test under O. 53 r. 8(1) is similar to that under O. 15 r. 6(2)(b) in that the applicants would have to show that they would be directly affected in terms of their rights and liabilities *vis-a-vis* the substantive application for judicial review as envisaged in p. 56B left column of *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52 (PC) which reads – "A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?".

I am unable to agree with the applicants' position as the Federal Court has categorically stated "I am of the view that the same test would apply to the appellant (MAIS) in the present case." and in my view the Federal Court is referring to the direct interest test ie, the test as enunciated in *ex parte Muldoon and Anor (supra)*; thus this means that the test in *Pegang Mining (supra)*, *albeit* a direct interest test, would not apply as the Federal Court was considering the direct interest test there in para 25 in the context of justifying intervention under O. 15 r. 6(2)(b) of the RHC.

[5] The applicants submitted they have fulfilled the test under O. 53 r. 8(1) of the RHC as the subject matter of the judicial review proceedings is within the legal interest of their Royal Highnesses the Sultan of Terengganu, Selangor, Kedah, Johor as well as the YDPA as the respective Heads of Islam in Melaka and Wilayah Persekutuan; similarly the subject is within the legal interest of the applicants as it falls within the wide scope of their statutory duties to aid and advise Their Royal Highnesses the Sultan of Terengganu, Selangor, Kedah, Johor as well as the YDPA as the respective Heads of Islam in the said States and Federal Territories and the subject is also within the scope of authority of the applicants, being the chief authorities in respect of all matters relating to Islam (except Hukum Syarak and the administration of justice) in the said States and Federal Territories.

[6] I find the learned Senior Federal Counsel (SFC), Dato' Kamaluddin was correct in submitting that O. 53 r. 8(1) of the RHC allows a person who is in opposition to the judicial review application to be heard subject to the judge's determination of whether the said person is a "proper person" or otherwise. However the learned SFC did not submit as who this "proper person" was. Learned SFC argued that the MAI and MACMA should be allowed to be made a party to oppose the judicial review application for the reasons:

(1) Their function as advisor of DYMM Sultan or DYMM Agung for States without Sultan in respect of all matters pertaining to the religion of Islam;

(2) Their function as the chief authorities in respect of all matters relating to Islam;

(3) The existence of the Control and Restriction of the Propagation of Non-Islamic Religious Enactments in various States in which the State Religious Councils also played a role;

(4) They are opposing the said application (substantive application);

(5) They will be affected if the applicant in having the decision of the respondents reviewed. We have submitted the case of *Ottavio Quattrocchi v. Menteri Dalam Negeri Malaysia & Ors* [2001] 4 CLJ 783;

A (6) It is our view that the position in MACMA is somewhat similar to that of the State Religious Council. This is based on their roles and functions towards the Muslims as has been submitted by Encik Tajuddin specifically the Malaysian Chinese Muslim.

B **[7]** I find the applicant correctly submitted that in *Bong Boon Chuen (supra)*, the Federal Court apart from deciding that O. 15 r. 6(2)(b) did not apply to judicial review proceedings also decided that in any event MAIS (Majlis Agama Islam Selangor) did not satisfy either O. 15 r. 6(2)(b) or O. 53 r. 8(1) on the grounds C which I reproduce:

(i) The proceedings before the High Court at Shah Alam were aimed at reviewing the decisions of the MBSA (Majlis Perbandaran Shah Alam) to allocate approximately 13.84 acres of land in a housing estate as a Muslim burial ground; D

(ii) MAIS was not involved in these decisions nor can it, at this stage, claim that it ought to have been involved;

(iii) In judicial review proceedings, the Court in exercising its supervisory jurisdiction would only be concerned with the E decision making process and not the decision itself;

(iv) The basis of the MAIS's purported interest in the judicial review proceedings has been stated in terms which would appear to go beyond the scope of the provisions of the F Enactment relied upon namely Sections 4 to 7;

(v) Matters of local government do not fall within the scope of MAIS;

(vi) MAIS had nothing to do with the decisions under challenge G in the judicial review proceedings;

(vii) In any event, MAIS is not directly affected by the decisions sought to be reviewed.

[8] I am mindful of the applicants' contention that the interest H of MAIS in *Bong Boon Chuen (supra)* and the subject matter of the dispute there are distinct and unrelated to the legal interests of the applicants in this instant application. I am also conscious of the learned SFC Dato' Kamaluddin's submission that previously during the hearing of the application for intervention under O. 15 I r. 6(2)(b) of the RHC the court held that they had a legal interest but the order of the court allowing intervention made on 3 August

2009 was set aside on 11 November 2009 due to the wrong mode and judicial notice can be taken of this decision and therefore the applicants are the "proper person" in the substantive judicial review application.

[9] In the determination of the proposed interveners' application brought by the various MAI and MACMA (encls. 13, 18, 20, 23, 26, 28, 31, 37 and 39) and the Malaysian Gurdwara Council (encl. 34), I had allowed the applications of the former and dismissed the latter's three application on 3 August 2009. I had orally stated, *inter alia*:

(1) that based on the Federal Court case of *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121, O. 15 r. 6 RHC applies to all civil proceedings and therefore the decision of the Court of Appeal in *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors.* [2008] 6 MLJ 488 was decided *per incuriam* in not following the Federal Court decision of *Staghorn (supra)*;

(2) following the principles on the right to intervene as per *Pegang Mining (supra)* and the need to fulfill the requirements of O. 15 r. 6(2)(b) of the RHC, I held the MAI had legal interest in the manner submitted by the learned SFC at p. 11 of the respondents' written submission dated 20 July 2009 (encl. 58) reproduced as follows:

(a) Their functions as the advisor of the DYMM Sultan or YDPA for states without Sultan in respect of all matters relating the religion of Islam;

(b) Their functions as the chief authorities in respect of all matters relating to Islam;

(c) The existence of the Control and Restriction of the Propagation of Non Islamic Religious *(sic)* Enactments in various states in which the State Religious Councils also played a role;

(d) They are opposing the said application (O. 53 r. 8 RHC 1980);

(e) They will be affected if the applicant succeeds in having the decision of the respondent reviewed (refer *Ottavio Quattrocchi V. Menteri Dalam Negeri Malaysia & Ors* [2001] 4 CLJ 783);

(3) As for MACMA their role and functions are somewhat similar to the MAI and they have a legal interest in the proceeding.

[10] But as I have alluded to before the direct interest test for the determination of who is a "proper person" to be heard in opposition for purposes of O. 53 r. 8(1) RHC is that enunciated in *ex parte Muldoon and Anor (supra)* and not as in *Pegang Mining (supra)*. What is of particular significance when addressing the direct interest test in *Bong Boon Chuen (supra)* and following the test in *ex parte Muldoon and Anor (supra)* the Federal Court stated at p. 320 A-B "It was concluded in that case *(ex parte Muldoon and Anor (supra))* that an indirect interest, even on the part of the Secretary of State, was not sufficient to justify joinder."

Therefore for MAI and MACMA to qualify under O. 53 r. 8(1) of the RHC, I am of the view they must show a direct interest as spelled out in *ex parte Muldoon and Anor (supra)*. I find they have failed to do so for the following grounds submitted by the applicant:

(1) The impugned decision is in relation to an exercise of power or discretion by the 1st respondent under the Printing Presses and Publications Act 1984 with regard to the applicant's right to use the word "Allah" in the "Herald – The Catholic Weekly" in a decision dated 7 January 2009. This decision only involved two parties, the 1st respondent and the applicant who is adversely affected by the decision (O. 53 r. 2(4)). Applying the reasoning in *Bong Boon Chuen (supra)*, MAI and MACMA were not involved in this decision nor can they, at this stage, claim that they ought to have been involved. MAI and MACMA had nothing to do with the decision under challenge in the present judicial review proceedings;

(2) MAI's role is purely to aid and advise the Heads of Religion of the States in matters relating to the religion of Islam. Matters under the Printing Presses and Publications Act 1984 do not fall within the scope of MAI. To say these matters which includes the exercise of the powers of the Minister of Home Affairs fall within the scope of the Majlis would appear to go beyond the scope of the provisions of the Enactment relied upon namely ss. 4 to 7; and

(3) MAI's action to intervene in these proceedings for the purpose of being heard in opposition on the notion of preventing widespread disobedience of God's laws amongst the Muslim community and the plural society is clearly misconceived as MAI have in their affidavits in support neither

demonstrated nor provided any basis to claim that the use of the word "Allah" in the "Herald – The Catholic Weekly" will lead to such consequences. If indeed any non Muslim had run foul of the Control and Restriction of the Propagation of Non Islamic Religions Enactments, then it is for the relevant authorities to take appropriate action to charge these persons. MAI who are not in any way connected to the exercise of powers of the respondents ought not to agitate on any matter which is not within their purview.

In my view at best the applicants have an indirect interest and as submitted by the applicant, the Federal Court in *Bong Boon Chuen (supra)* held any views or stand taken by MAIS can still be forwarded to MBSA and duly considered by MBSA in presenting and defending MBSA's case in the judicial review proceedings. Transposed to the facts of this instant case, the respondents support the applicants' stand and if MAI and MACMA support the impugned decision of the 1st respondent, they are at liberty to adopt the approach advocated by the Federal Court in *Bong Boon Chuen (supra)*.

[11] For the foregoing reasons, the applications of the applicants (MAI and MACMA) be dismissed with no order as to cost.